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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(El Dorado)

GARY LEE, Plaintiff and Respondent, v. GABRIEL CUNICH et al., Defendants and Appellants.	C085726 (Super. Ct. No. PC20120475)

Appellants Gabriel Cunich and Interglobal Logistics, Inc. (IGL) appeal a judgment entered after default for failure to answer Gary Lee's complaint for conversion and following a prove-up hearing to determine Lee's damages. Appellants argue: (1) the trial court abused its discretion in denying their timely motion to set aside the default under Code of Civil Procedure section 473;[1] (2) the court exceeded its jurisdiction in awarding damages in excess of the amount alleged in the complaint; and (3) the court

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1 Undesignated statutory references are to the Code of Civil Procedure.

erred in failing to require Lee to prove the elements of his claim and damage suffered at the prove-up hearing.

We will remand for modification of the judgment to strike the portions in excess of the court's jurisdiction in accordance with limitations proscribed in section 580. The judgment is otherwise affirmed.

FACTUAL AND PROCEDURAL HISTORY

On August 15, 2012, Lee filed a Judicial Council form complaint against Cunich, IGL, W. Jan Litwin, and Western Enterprises for damages arising from conversion of certain property identified in exhibit A, purportedly attached. Lee averred Cunich and IGL took possession of this property on or about July 2011 and converted it for their own use. Lee demanded the return of the property, but was refused, resulting in $87,665.47 in damages. In addition, Lee averred unidentified losses for efforts undertaken to recover that property, occurring after the taking up until the filing of the complaint. Finally, Lee requested $100,000 in exemplary damages. The prayer of the complaint requested a "judgment for costs of suit; for such relief as is fair, just, and equitable; and for . . . compensatory [and] punitive damages." It stated, "The amount of damages is . . . in the amount of: $87,665.47."

According to the return of service dated October 12, 2012, a process server named Dillon John Riddle personally served Cunich and IGL with the summons, complaint, and other associated documents. The return stated, the parties served were "GABRIEL CUNICH INDIVIDUALLY AND DBA INTER GLOBAL LOGISTICS INC" and attested the process server "personally delivered the documents listed in item 2 to the party or person authorized to receive service of process for the party . . . ." Service was completed on Cunich individually and on IGL under section 416.10. This service occurred at 201 C Street, Suite B in Hayward, California on October 9, 2012, at approximately 4:30 p.m.

While Litwin and Western Enterprises filed a general denial to Lee's complaint on November 9, 2012, Cunich and IGL failed to file any responsive pleading. Lee obtained a default against them on July 24, 2013. On August 5, 2013, Cunich and IGL moved to set aside the default under section 473, subdivision (b), arguing Cunich was not served, and based on a conversation with Lee, he did not believe he had to take any action. Cunich's supporting declaration stated in pertinent part, "I had not seen a copy of the summons and complaint in this action prior to my attorney, Kathryn L. Anderson, providing me with a copy of the documents. I was not served with the summons and complaint. Late in 2012, Litwin told me that a lawsuit was pending, but that his attorney would protect my legal interests. I heard nothing further until July 22, 2013, when I received a copy of the Request for Entry of Default Judgment in the mail. I immediately contacted [Anderson] and asked her to check into this matter."

Included with Lee's opposition to the motion were declarations from Lee's attorney, C. Alexandre Barbera, and the process server, Riddle. Barbera attested to speaking with Cunich in May 2012, wherein he demanded that Cunich immediately return Lee's property and warned that failure to return that property would result in a lawsuit against Cunich and IGL for conversion. Barbera had used the same process server for more than 15 years and had "never known them to give [him] an inaccurate or false proof of service." Riddle's description of Cunich and IGL's office and Cunich's appearance matched that given by Lee.

Riddle's declaration filed in support of Lee's opposition attested that after an unsuccessful attempt to locate IGL based upon the street address alone, Riddle obtained directions to IGL from a woman at the company's phone number. He followed those directions and entered the manager's office. An "African American woman" greeted Riddle and directed him to where he could locate Cunich. Riddle went to that room and spoke to a man "who identified himself as Gabriel Cunich." Riddle's declaration

described what he saw: "That gentleman who identified himself as [Cunich] was around 55-60 years old, white haired, wore glasses, around 5'6" in height, and weighed around 230-235 pounds. His complexion was quite dark, and although he was a Caucasian, I believed he may have been of Italian or Greek descent. He was sitting at a desk on which there was a desk plate with his name." After Cunich identified himself, Riddle told him he was a process server and provided Cunich the documents. Riddle believed he could identify the person he served if necessary.

In reply, Cunich and IGL continued to argue that Cunich was not served and thus their failure to act was based on a reasonable belief they did not have to take any action. Cunich and IGL disavowed they were in any way relying on Litwin's attorney to represent them. In support of the reply, Cunich and IGL filed declarations by Anderson, Ximena Cunich, and Cunich. Anderson attested she had known and represented Cunich for over 13 years, and based upon her experience, she believed he would have contacted her immediately had he been served.

Ximena Cunich declared she was the CFO of IGL, and she and Cunich were the only individuals authorized to accept service for IGL. Their office was small, and she would have seen anyone entering it. She did "not recall anyone identifying themselves as a process server coming into the office on October 9, 2013 or any other date for several years." She continued: "Had [Cunich] been served with a summons and complaint in this matter, he would as both a husband and a co-owner [have] brought the papers to me immediately. One or the other of us would have contacted our attorney, Kathryn L. Anderson, and we would have jointly worked with her on the matter as we have in other legal matters for over thirteen years. Had [Cunich] and IGL been served, we would have defended ourselves as we do not believe we are the responsible parties. . . . [¶] We have searched IGL's files and have not located a

summons and complaint in this case. To be very clear, we simply would not have ignored a complaint had we been served."

Finally, in a supplemental declaration, Cunich attested: "[H]ad I been served with a summons and complaint in this action, I would have immediately contacted Kathryn L. Anderson, who I have known for over 13 years and has served as my counsel in a number of other business related legal matters. [¶] . . . [¶] . . . I have looked through the office papers and files several times since receiving the Request for Entry of Default Judgment for a Summons and Complaint. There are no such papers in the office or in my personal files. I simply do not have them."

Prior to the hearing on his motion, Cunich filed an amended declaration, wherein he attested: "I do not weigh 230-235 pounds and am neither Italian nor Greek. In October 2012, I weighed 198 pounds. My complexion is not 'quite dark' as I am of eastern European descent. If anyone could possibly have fit [Riddle]'s description, it might have been my friend [M.T.] who [since] October 2012 often worked in the office. [M.T.] is of mid-eastern descent and while he is approximately my height, he is substantially heavier than I am. However, if [M.T.] had been served with a summons and complaint I know for certain that he would have given me the papers. Unfortunately, [M.T.] is in Chile and is being treated for liver and pancreatic cancer. Under the circumstances, I will not bother him with this matter. There is no one at IGL authorized to accept service of a summons and complaint except me and my wife, Ximena Cunich . . . ." Cunich admitted speaking with Barbera in May 2012, but denied telling Barbera that he would get back to him about returning Lee's property. He also admitted speaking with his attorney in February 2013 about the lawsuit and believed he did not have to do anything because he had not been served with a complaint. He "did not find out that [he] was a part of this suit until July 25, 2013, when [he] received a copy of the

Request for Entry of Default Judgment in the mail from [Barbera]. [He] contacted [Anderson] on the same day."

The court's ruling denying Cunich and IGL's request for relief from default recognized that under section 473, subdivision (d), a default would be void if the complaint and summons had not been appropriately served. However, the court was unpersuaded by the declarations in support of the motion and determined "under the totality of the circumstances . . . that the registered process server's declaration is credible." The court thus denied the motion.

After Litwin and Lee resolved their portion of the case, Lee scheduled a prove-up hearing for August 14, 2017. Lee's papers submitted in support of his prove-up request stated he was owed: (1) $79,962.35 in damages for the conversion, plus statutory interest from July 1, 2011; (2) minus $12,125.00 recovered on July 1, 2014 for property later returned and sold; (3) plus $6,640 in accounting services and $698.85 in moving expenses expended in recovery of his converted property; and (4) $140 in court and service costs. Lee dropped his request for punitive damages.

The prove-up hearing was not transcribed and thus is not part of the record on appeal. However, the court's docket reflects that Lee personally testified at the hearing and also submitted five premarked exhibits in support of his request for damages. Exhibit 1, which was a list of the property taken and values, was admitted at that hearing. On August 15, 2017, the court issued an order granting Lee the amounts requested. This same day, the court entered judgment, ordering that Cunich and IGL would be "individually and jointly" liable as follows: (1) "Damages for conversion of plaintiff's personal property in the amount of $79,962.35"; (2) "Plaintiff's costs to recover his property totaling $7,038.85 (consisting of $6340.00 accounting costs and $698.50 transportation)"; (3) "Pre-judgment interest of $34,288.65"; (4) "Costs of suit in the

amount of $140.00"; and (5) "Defendants are entitled to a setoff against this Judgment in the total amount of $12,125.00." Cunich and IGL timely appealed.

DISCUSSION

I

The Motion to Set Aside the Default

Cunich and IGL argue the trial court abused its discretion in denying their timely motion to set aside the default under section 473. We disagree.

Cunich and IGL fail to explain how their asserted "non-service" amounts to "mistake, inadvertence, surprise or excusable neglect" from which relief could be granted under section 473, subdivision (b). Rather, in reality, Cunich and IGL's argument amounts to a jurisdictional challenge, cognizable under section 473, subdivision (d), and the court's power in equity to set aside a judgment obtained through extrinsic fraud. (See *Rodriguez v. Cho* (2015) 236 Cal.App.4th 742, 748-749 (*Cho*) [challenge to default judgment on ground summons was never served contrary to process server's declaration is cognizable under section 473, subd. (d)]; *City of Los Angeles v. Morgan* (1951) 105 Cal.App.2d 726, 730 [recognizing a party may attempt to rebut the presumption of proper service].) This is consistent with the trial court's treatment of Cunich and IGL's motion that found under section 473, subdivision (d), a default would be void if the complaint and summons had not been appropriately served. However, the court denied Cunich and IGL's motion because it found the process server's account credible, thus impliedly rejecting Cunich and IGL's claims they were not properly served.

We review this determination for an abuse of discretion (*Fernandes v. Singh* (2017) 16 Cal.App.5th 932, 940 (*Singh*); *Cho*, *supra*, 236 Cal.App.4th at p. 749) that shall only be granted if "the trial court exceeded the bounds of reason." (*Anastos v. Lee* (2004) 118 Cal.App.4th 1314, 1318-1319.) In conducting this review, we must defer to

the trial court's resolution of factual conflicts in the competing declarations. (*Singh*, at p. 940.)

Here, Lee filed a return of service by a process server attesting to the personal service of the summons, complaint, and related documents on Cunich and IGL through Cunich's service under section 416.10. Under Evidence Code section 647, these facts were presumed true, thus creating a presumption of proper service. While Cunich and IGL attempt to challenge the validity of service upon them by arguing that Cunich was not actually served by Riddle, the trial court rejected their showing. Instead, the court found Riddle's account that he had personally served Cunich was credible. We cannot say the trial court's decision to reject the declarations filed in support of nonservice exceeded the bounds of reason. (*Anastos v. Lee*, *supra*, 118 Cal.App.4th at pp. 1318-1319.) Like the appellant in *Singh* whose factual claim of nonservice had been rejected by the trial court (*Singh*, *supra*, 16 Cal.App.5th at pp. 940, 941, fn. 6), we too defer to the trial court's decision finding valid service. (See also *Cho*, *supra*, 236 Cal.App.4th at p. 751 [trial court may reject self-serving declaration offered to contradict process server's declaration of service].)

II

The Amount of the Default Judgment

Cunich and IGL generally argue the trial court exceeded its jurisdiction when it entered a judgment in excess of the amount of damages requested in Lee's complaint. We concur, but as we shall explain, the proper judgment is actually less than the full $87,665.47 requested in the prayer.

Section 580, subdivision (a), provides in pertinent part: "The relief granted to the plaintiff, if there is no answer, cannot exceed that demanded in the complaint, in the statement required by Section 425.11, or in the statement provided for by Section 425.115; but in any other case, the court may grant the plaintiff any relief consistent with

the case made by the complaint and embraced within the issue." "Section 580, and related sections 585, 586, 425.10 and 425.11, aim to ensure that a defendant who declines to contest an action does not thereby subject himself [or herself] to open-ended liability. Reasoning that a default judgment that exceeds the demand would effectively deny a fair hearing to the defaulting party, the Courts of Appeal have consistently read the code to mean that a default judgment greater than the amount specifically demanded is void as beyond the court's jurisdiction. [Citations.]" (*Greenup v. Rodman* (1986) 42 Cal.3d 822, 826 (*Greenup*).)

"[T]he primary purpose of . . . section [580] is to guarantee defaulting parties adequate notice of the maximum judgment that may be assessed against them." (*Greenup, supra*, 42 Cal.3d at p. 826.) Accordingly, compliance with this section is to be strictly construed. (*Ibid*.) Thus, "[i]f a default judgment awarded against a defendant exceeds the relief demanded in the complaint [citation], or is a different form of relief than that demanded in the complaint [citation], the defendant is 'effectively denied a fair hearing . . . [citations].' [Citation.]" (*Stein v. York* (2010) 181 Cal.App.4th 320, 326.) Accordingly, the damages awarded in a judgment must fit within the amount requested in the complaint for that specific type of injury and cannot be saved by aggregating the total amount of damages requested. (*Becker et al. v. S.P.V. Construction Company, Inc*. (1980) 27 Cal.3d 489, 494-495 (*Becker*) ["It is irrelevant that the award of damages was within the total amount of compensatory and punitive damages demanded in the complaint"].) Such void judgment may be challenged at any time. (§ 473, subd. (d); *Cho, supra*, 236 Cal.App.4th at p. 752.)

Nonetheless, section 580 does not prohibit the trial court from requiring the payment of money in an amount not specifically delineated in the complaint where that money falls outside of the "relief" contemplated in that section. For example, in *Simke, Chodos, Silberfeld & Anteau, Inc. v. Athans* (2011) 195 Cal.App.4th 1275 at page 1293,

the court recognized that prevailing party attorney fees awarded for the instant suit were not damages falling within the "relief" limited by section 580. Thus, in that case, the trial court properly awarded both the $285,246.81 in attorney fees from a prior litigation that were damages specifically identified in the complaint and the $427,466.29 in attorney fees for successfully prosecuting the suit to collect the former. (*Athans,* at pp. 1283, 1293.) However, a general request for the payment of such money must be included in the complaint. (*Becker*, *supra*, 27 Cal.3d at p. 495 [section 580 prohibited award of attorney fees *not requested* in complaint].)

Cunich and IGL generally complain the trial court awarded a judgment in excess of its jurisdiction, but do not individually parse the components of that judgment or opine on what portion of the judgment is allowable. This superficial treatment ignores that only the portion of the judgment not complying with the requirements of section 580 is void. (See *Becker, supra*, 27 Cal.3d at p. 495 [only the portion of the judgment in excess of the $20,000 demand for damages was void].)

Here, the prayer in the complaint listed Lee's total damages as "$87,665.47." Other portions of the complaint identified these damages as coming from the conversion of Lee's property. Thus, Lee could have recovered up to $87,665.47 for the converted property; however, he was awarded $79,962.35 for that loss. The complaint did not identify any damages for the costs of attempts to recover the converted property, nor did the complaint request interest. Accordingly, Lee could not recover money associated with either of these categories. (See *Becker, supra*, 27 Cal.3d at pp. 494-495 [rejecting use of aggregated damages requested to save awards in excess of amount allowed under section 580]; *Stein v. York, supra*, 181 Cal.App.4th at p. 327 [no damages may be awarded on a complaint that requested damages according to proof].) The complaint did generally request recovery for "costs," for which the court awarded $140. Thus, Lee's

judgment is limited to an award of $80,102.35. Any amounts in excess of that are void and must be stricken.

III

The Sufficiency of the Evidence Supporting the Award

Cunich and IGL argue the trial court erred in failing to require proof of the elements of Lee's conversion claim or the value of the property converted. We disagree.

Lee was not required to separately prove the elements of his conversion claim. Appellants' default operated to admit those allegations contained within Lee's complaint. (See *Ostling et al. v. Loring* (1994) 27 Cal.App.4th 1731, 1750 [plaintiff not required to adduce proof of malice at prove-up hearing for nondiscretionary doubling of actual damages because malice for that purpose was admitted by virtue of the default].) Further, Cunich and IGL's failure to provide a transcript of the prove up hearing wherein Lee testified dooms their appellate challenge to the sufficiency of the evidence supporting the amount of the damages awarded for the conversion of Lee's property. (See *Singh*, *supra*, 6 Cal.App.5th at p. 941 [punitive damage challenge failed for lack of transcript of the trial, thus prohibiting review of trial court's factual findings].)

The party challenging the judgment or order has the burden of showing reversible error by an adequate record. (*Ballard v. Uribe* (1986) 41 Cal.3d 564, 574; see *Estate of Davis* (1990) 219 Cal.App.3d 663, 670, fn. 13 ["to overcome the presumption of the correctness," appellant must assure record reflects the asserted error].) "[T]he reviewing court presumes the judgment of the trial court is correct and indulges all presumptions to support a judgment on matters as to which the record is silent." (*Baker v. Children's Hospital Medical Center* (1989) 209 Cal.App.3d 1057, 1060.) Without a record of the evidence presented to the trial court at the hearing, we must affirm the judgment. (*Weiss v. Brentwood Sav. & Loan Assn.* (1970) 4 Cal.App.3d 738, 746-747.)

Where "the record on appeal consists of only a clerk's transcript and exhibits and no error appears on the face of the record, the sufficiency of the evidence to support the trial court's rulings is not open to consideration by a reviewing court; in such a case, 'any condition of facts consistent with the validity of the judgment will be presumed to have existed rather than one which would defeat it [citations].' " (*County of Los Angeles v. Surety Ins. Co.* (1984) 152 Cal.App.3d 16, 23.) If a reporter's transcript of the hearing was not obtainable, Cunich and IGL could have avoided the application of this rule by proceeding with an agreed or settled statement. (*Leslie v. Roe* (1974) 41 Cal.App.3d 104, 108; see Cal. Rules of Court, rules 8.134, 8.137.)

DISPOSITION

The matter is remanded to the trial court with directions to modify the judgment to strike the portion in excess of $80,102.35. The judgment is otherwise affirmed. The parties shall bear their own costs on appeal. (Cal. Rules of Court, rule 8.278.)

/s/
HOCH, J.

We concur:

/s/
BLEASE, Acting P. J.

/s/
RENNER, J.